

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Public Inquiry Concerning the
Terms of 39 U.S.C. 404(d)

Docket No. PI2016-2

COMMENTS OF ELAINE MITTLEMAN ON THE
COMMISSION'S JURISDICTION TO REVIEW POSTAL SERVICE
DETERMINATIONS TO CLOSE POST OFFICES

(February 5, 2016)

I appreciate the opportunity to provide comments on Docket No. PI2016-2.

PERTINENT STATUTORY AUTHORITY

The applicable statute is 39 U.S.C. § 404(d). The Commission has explained that, under 39 U.S.C. § 404(d), the Postal Service must provide notice prior to making a determination to close any post office. Notice of its intent to close is required at least 60 days before the proposed closure date to ensure that patrons have an opportunity to present their views regarding the closing. If the Postal Service decides to close the post office, it must make its Final Determination available to the public for 30 days, allowing the patrons the opportunity to appeal the determination to the Commission. The Commission reviews the Postal Service's determination to close or consolidate a post office on the basis of the record before the Postal Service in the making of such

determination, as required by 39 U.S.C. § 404(d)(5). The Postal Service shall take no action to close or consolidate a post office until 60 days after its written determination is made available to persons served by such office. *See* 39 U.S.C. § 404(d)(4).

In making a determination whether or not to close a post office, the Postal Service must consider the following factors, pursuant to § 404(d)(2)(A): the effect on the community; the effect on postal employees; whether a maximum degree of effective and regular postal service will be provided; and the economic savings to the Postal Service.

The Commission has repeatedly rejected the Postal Service's jurisdictional arguments based on the Postal Service's internal categorization of its retail facilities. *See* Docket No. A2010-3, Order No. 477, Order Dismissing Appeal (East Elko), June 22, 2010, at 5-6.

The Commission shall set aside any determination, findings, or conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) without observance of procedure required by law; or (C) unsupported by substantial evidence on the record. The Commission may affirm the determination of the Postal Service or order that the entire matter be returned for further consideration. *See* 39 U.S.C. § 404(d)(5).

PERTINENT REGULATIONS

39 CFR § 241.3 Discontinuance of USPS-operated facilities.

...

(f) Postal Service decision –

...

(2) Approval.

...

(ii) **Appeal rights.** If the USPS-operated retail facility subject to discontinuance is a post office, the Final Determination must include the following notice: “Pursuant to Public Law 94-421 (1976), the Final Determination to (close) (consolidate) the (Facility Name) may be appealed by any person served by that office to the Postal Regulatory Commission, 901 New York Avenue, NW, Suite 200, Washington, D.C. 20268-0001.

JURISDICTION FOR REVIEW OF CLOSINGS

Order No. 2862, which is seeking comments on Commission jurisdiction concerning post office closings, states at page 1 that petitions filed before the Commission about post office closings “often indicate a misunderstanding among the general public of the scope of Commission authority” to review Postal Service decisions. I respectfully submit that the confusion is on the part of the Commission. The statute provides that the Commission must review Postal Service determinations to close post offices. However, the Commission has followed its own previous orders [such as *Oceana*, Order No. 436 Dismissing Docket No. A82-10, June 25, 1982], which do not comply with the law and do not consider the pertinent regulations, including 39 CFR § 241.3.

The Postal Service has separate procedures for closings and for relocations. These procedures are set out in 39 CFR § 241.3 (closings) and 39 CFR § 241.4 (relocations). The regulations do not include the term, “rearrangement” or discuss rearrangements within a community. That description was created in *Oceana* and is not part of the regulations.

There is a fundamental misunderstanding by the Commission as to its duty in reviewing Postal Service determinations. It is up to the Postal Service to determine whether the Postal Service is closing a postal facility or whether it is relocating a postal facility. The Commission must review the process used by the Postal Service in its determination based on the Postal Service record. The Commission does not have the authority to make the determination as to whether the action taken by the Postal Service is a closing or a relocation (or the made-up concept of rearrangement of facilities within a community).

The Commission notes in its orders reviewing petitions that 39 U.S.C. § 404(d)(5) “requires that the Commission review the Postal Service’s determination on the basis of the record that is before the Postal Service.” The record compiled by the Postal Service clearly indicates whether the procedure is for a closing or for a relocation. The procedures are different and there is a bright-line distinction between them in the procedures used by the Postal Service. Thus, there is no confusion. It is not up to the Commission to determine whether the procedure is a

closing or a relocation. The Commission has badly misunderstood its role and undertaken an analysis in violation of 39 U.S.C. § 404(d)(5) when it analyzes whether the action proposed is a “rearrangement” of facilities.

The confusion of the Commission is indicated by the statement in Order No. 2862 at page 2, which explains that “the Commission signaled its intent to initiate this type of separate proceeding in which it could consider the scope of its appellate authority with regard to relocations and rearrangements of postal retail facilities ...” The Commission does not have the authority to determine its jurisdiction to review closings under section 404(d)(5). It is the Postal Service that determines whether a facility is being closed or relocated. It must be appreciated that the term, “rearrangement,” was referenced years ago in the *Oceana* decision by the Postal Rate Commission and is not a proper category of action concerning postal facilities.

Further, the Commission stated in Order No. 2862 at page 3 that “Section 404(d)(5) does not, however, authorize the Commission to reject or modify the Postal Service’s determination by substituting its judgment for that of the Postal Service.” The Commission’s efforts to conduct its own analysis violates section 404(d)(5) because the Commission substitutes its own judgment as to what constitutes a closing or a relocation instead of reviewing the determination of the Postal Service to close a postal facility.

The case involving the Pimmit Branch in Virginia [Order No. 1159 Dismissing Appeal, issued January 20, 2012] is an example of the Commission's violation of section 404(d)(5). The determination of the Postal Service was to close the Pimmit Branch. The Commission instead decided the action was a rearrangement of facilities, which is not a term in the regulations. The Commission then decided it did not have jurisdiction, even though the Postal Service determination to close the Pimmit Branch is clearly reviewable pursuant to 39 U.S.C. § 404(d)(5).

I worked on the appeal of the Pimmit Branch and have been personally affected by the closing of that postal facility. I want the Commission to know that I continue to be demoralized that such a vital postal facility was closed. The Pimmit Branch is in the Pimmit Hills community, which is near Tysons Corner. It is frankly absurd that the Postal Service would close a facility in an area that is experiencing such growth. Further, it is demeaning that there was such a lack of respect paid to the needs and wishes of the persons in the Pimmit Hills community concerning having a convenient postal facility.

The Commission did not have the authority to decide on its own that it did not have jurisdiction to review the Postal Service determination to close the Pimmit Branch. The willingness of the Commission to decide on its own that it did not have jurisdiction in violation of the statutory provision for review of post

office closings is extremely troubling. Moreover, the Commission's sua sponte determination that it did not have jurisdiction revealed a fundamental lack of concern for due process and compliance with statutes.

The unauthorized practice of the Commission to decide on its own whether it has jurisdiction apparently began with the 1982 ruling of the Postal Rate Commission in *Oceana*. The decision predates the regulations and is not good law. *Oceana* cannot now serve as a precedent on which the Commission relies for review of determinations to close postal facilities.

However, the Commission has relied repeatedly upon *Oceana* and what has been called its progeny. The Commission seems to fail completely to understand that it must comply with 39 U.S.C. § 404(d)(5) and 39 CFR § 241.3, rather than an outdated and invalid ruling from 1982. Moreover, the Commission seems to have developed its own set of rationales, featuring a discussion of what is a “rearrangement,” instead of citing the pertinent regulations. If the Postal Service has conducted the procedure to close a postal facility, pursuant to 39 CFR § 241.3, it is not up to the Commission to decide that what really happened was a rearrangement.

It is very important that the Commission repudiate *Oceana* and its progeny. Moreover, the Commission must cease its misguided initiative to conduct its own analysis as to what it is a rearrangement. The Order at page 5 states that the

“Commission has consistently applied its rationale used in *Oceana* and dismissed several post office closing appeals on the grounds that the Postal Service action constituted a rearrangement of retail facilities within a community.” By its repeated reliance on *Oceana* and thereby making up its own decision as to whether there is a rearrangement of facilities, the Commission perpetuates its violation of the requirement that it follow the record of the Postal Service. If the determination of the Postal Service is that it is closing a facility, the Commission cannot ignore that and baldly assert that the action is a “rearrangement.” The Commission’s continued focus on *Oceana* reveals the insular nature of the Commission’s work product. Instead of citing pertinent regulations, the Commission relies on a 1982 opinion that predates the regulations and is not good law.

The regulations for closings, 39 CFR § 241.3, are used by the Postal Service when it makes a determination to close postal facilities. The analysis to be conducted by the Commission on appeal should be whether the Postal Service complied with 39 CFR § 241.3. The Commission cannot on its own initiative decide that it does not have jurisdiction to review the determination by the Postal Service to close a postal facility. The review by the Commission is required by 39 U.S.C. § 404(d)(5).

PRESUMPTION IN FAVOR OF REVIEW

It is important to emphasize the fundamental importance of review of an agency's actions. The Commission is required by 39 U.S.C. § 404(d)(5) to review the Postal Service's determination to close or consolidate a post office on the basis of the record before the Postal Service in the making of such determination.

In *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988), the Supreme Court addressed 5 U.S.C. § 704 of the Administrative Procedure Act (APA). The Court noted that the primary thrust of § 704 was to codify the exhaustion requirement. However, the section also provided that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." For example, the Federal Trade Commission and National Labor Relations Board orders were directly reviewable in the regional courts of appeals. Those review provisions remained in the Code. *Bowen*, 487 U.S. at 903, n. 37.

There are many direct-review statutes and Congress has given the District of Columbia Circuit exclusive jurisdiction for review of many agency actions. See Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Public Policy 131 (2013). The provision, 39 U.S.C. § 3663, for review in the District of Columbia Circuit of final orders of the Postal Regulatory Commission is a direct-review statute. Thus, the general grant of review in the APA does not apply. Further, that APA grant typically provides for review by bringing a claim in

district court as a plaintiff, pursuant to 5 U.S.C. § 702, rather than by seeking review of a final agency order in the D.C. Circuit.

The D.C. Circuit opinion in *Mittleman v. Postal Regulatory Commission*, 757 F.3d 300 (D.C. Cir. 2014), is plainly wrong. The *Mittleman* opinion confuses the APA general review provisions for seeking a claim as a plaintiff in district court with filing a petition in the D.C. Circuit for review of an agency order pursuant to a direct-review statute.

The D.C. Circuit violated its duty pursuant to 39 U.S.C. § 3663 to review the final orders of this Commission. That failure resembles the failure of the Commission to review the determinations to close post offices, such as Pimmit.

In both cases, reviewing bodies [the D.C. Circuit and the Commission] have violated their fundamental duty to review orders or determinations. The public should have at least some faith that government entities perform their duties. When reviewing bodies decide on their own that they do not have jurisdiction, even though there is a plain statutory provision that establishes jurisdiction, the most basic premise of review is violated.

I respectfully submit to the Commission that I am seeking avenues, perhaps through writing an article, to point out the fundamental flaw in the D.C. Circuit's opinion. The D.C. Circuit is known as the appellate court that reviews agency actions and orders. The role of the judiciary is called into question if the D.C.

Circuit becomes a court that violates its statutory duty to review final agency actions.

I am very grateful that the Commission has established this docket to facilitate a discussion about the Commission's jurisdiction to review Postal Service determinations about post office closings. I hope this presents an opportunity for the Commission to reinforce in the strongest possible language the necessity of due process and review of determinations of the Postal Service. I would be glad to provide further comments or assist the Commission in this effort.

Respectfully submitted,

/s/ Elaine Mittleman
Elaine Mittleman
2040 Arch Drive
Falls Church, VA 22043
(703) 734-0482
elainemittleman@msn.com